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No.

In the Supreme Court of the United States

OCTOBER TERM, 1905.

THE UNITED STATES,

Petitioner,

vs.

G. FALK & BROTHER,

Respondents.

Office Supreme Court
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JAMES

BRIEF FOR RESPONDENTS ON APPLICATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

EDWARD S. HATCH,
J. STUART TOMPKINS,
Counsel for the Respondents.

APPEAL PRINTING COMPANY, 14-16 VESEY ST., NEW YORK

In the Supreme Court of the United States.

THE UNITED STATES,
Petitioner,

against

G. FALK & BRO.,
Respondents.

BRIEF ON BEHALF OF RESPONDENTS.

Statement.

The merchandise which is the subject of this petition is leaf tobacco in bales. It was imported from Rotterdam on the Steamship Ryndam, and was entered at New York on June 2, 1902. The total importation consisted of thirty-one bales, numbered 2239 to 2269, inclusive. According to the consular invoice, which is a sworn document and presumptively correct, the gross weight of the thirty-one bales, at the time they left Rotterdam, was 2473.5 kilos. At the rate of 2.2046 pounds to the kilo this equals 5453.0781 pounds. According to the government weigher's return, which is like-

wise presumptively correct as to weight, the thirty one bales, at the time of landing, weighed 5,520 pounds. So that the bales in question had gained, on the voyage of importation, 66.9219 pounds.

(Note. It has always been found impracticable to print the invoice and entries in these custom cases, as will be obvious from an inspection, although it has always been agreed on both sides that they are a part of the record. The United States Attorney called upon the Collector for their production for use in the Courts below in this case, and we have accordingly called upon the Collector to file them in the office of the Clerk of this Court, for inspection, if necessary.)

The record in this case covers bales numbered 2243, 2244 and 2263 of the above importation. According to the Goverment weigher's return these bales weighed 178, 179 and 181 pounds respectively at the time of landing. These bales were withdrawn from bonded warehouse about one year after importation, and weighed at that time eight pounds less than at time of entry.

The question, therefore, presented in this case is one whether the moisture which such tobacco absorbs on the voyage of importation, and which disappears again, while it is in the custody of the government, and before it is delivered over to the importer to enter into the body of the merchandise of the country for consumption, is dutiable at the rate of $1.85 to the pound.

It is submitted that the statement made by the learned Soliciter General about the importance of this question by reason of possible loss of revenue is speculative, and wholly unwarranted by the record or experience. For example: In February,

1903, the United States Circuit Court held that silk ribbons were properly dutiable at 50% *ad valorem* instead of at 60% *ad valorem*, the rate theretofore imposed.

This decision (which according to Government reasoning in the case at bar, should have resulted in reduced revenue), instead of leading to a loss of revenue, caused an increase of $318,227.47 in revenue from silk ribbon importations for the year immediately following the decision.

So also the 20 per cent. reduction in duties on goods from Cuba caused the importation of $82,922,306 worth of dutiable merchandise in 1905, the first full fiscal year after the Reciprocity Treaty between the United States and Cuba went into effect; whereas, in 1903, the last full fiscal year previous to the operation of the treaty, only $59,827,983 worth of dutiable merchandise from Cuba was imported. In other words, although there was a 20 per cent. reduction in duties, the value of dutiable merchandise imported from Cuba increased approximately $23,000,000 during the above period (see Commerce and Navigation of the United States, 1905, p. 21 and p. 33).

Clearly it would have been fallacious for the Government to have estimated at the beginning of the 20 per cent. Cuban Treaty duty reduction that the revenue to be derived from imports from Cuba for the succeeding years would be lessened 20 per cent. So also in the present case we contend that the abolition of duty collections on water, not inherently or commercially a part of the taxable subject, tobacco, will not necessarily cause any loss of revenue, but is more likely to result in larger tobacco importations and increased revenue.

We respectfully predict that home interests will be benefited by the increased importations of the crude product, and the consequent encouragement and expansion of the American cigar manufacturing industry.

The Solicitor General at page 3 of his brief gives "serious loss of revenue" and "the conflicting views of the tribunals below as to the law" as the two reasons why "a review by this Court seems specially important."

For the reasons above stated, we submit that there will be no loss of revenue. And as to the alleged conflicting decisions, we need only say that the "conflict" is not between any two rulings of different Circuit Courts of Appeal, but merely between the unanimous decision herein of the Circuit Court of Appeals for the Second Circuit and of the *Circuit* Court of the Southern District of New York.

This is not one of those conflicts of decisions which this Court has stated justifies review.

In *Forsyth vs. Hammond*, *166 U. S.*, *506*, *514* Mr. Justice BREWER, speaking for this Court said:

> "We reaffirm in this case the propositions heretofore announced, to wit, that the power of this Court in certiorari extends to every case pending in the Circuit Courts of Appeal, and may be exercised at any time during such pendency, provided the case is one which but for this provision of the statute would be finally determined in that Court. And further, that while this power is co-extensive with all possible necessities and sufficient to secure to this Court a final control over the litigation in all the Courts of Appeal, it is a power which will be sparingly exercised, and *only when the circumstances of the case satisfy us*

that the importance of the question involved, the necessity of avoiding conflict between two or more Courts of Appeal, or between Courts of Appeal and the Courts of a State, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise."

It is further stated in the brief for the petitioner that there are 8,252 protests on tobacco now pending before the Board of General Appraisers, but it is to be borne in mind that protests under this topic are filed both at the time of entry and the time of withdrawal. In the present case for example, there were thirty-one bales entered upon which a protest was filed at the time of entry, and another each time that a bale or more was withdrawn, so that this one importation of thirty-one bales involves seventeen protests, and the 8,252 protests which usually would represent that many importations does not on the present issue represent by a great number so many importations as the statement contained in the petition would indicate without further explanation.

ARGUMENT.

I.

The principle of law which the Circuit Court of Appeals applied to the facts in this suit is clear, has long been settled and aquiesced in by the Treasury Department, and would seem to need no reiteration by this Court.

The principle which the Circuit Court of Appeals applied to the present case, was announced

by this Court in *Seeberger vs. Wright & Lawther Co., 157 U. S., 183.*

In that case the merchandise was flaxseed which was dutiable at twenty cents per bushel of fifty pounds. The proof in the case showed that the seed contained dust, composed of clay, sand and gravel to an average of four per cent. The collector refused to allow for the four per cent. of dust in computing the dutiable number of bushels at 50 pounds to the bushel. This Court held that an allowance should be made for such average four per cent. of dust, and that "twenty cents per bushel of fifty-six pounds" meant "56 pounds of clean seed, or at least seed freed from any 'accidental' impurities, such as the clay, sand and gravel in question.

Mr. Justice BROWN, delivering the opinion of this Court, said:

> "We think the Court below was correct in assuming that the flaxseed in question, which is made dutiable by the Act of 1883 at 'twenty cents per bushel of fifty-six pounds', less the tare, means fifty-six pounds of clean seed, or at least seed freed from any accidental impurities, such as the clay, sand and gravel in question. If this seed had been washed or otherwise cleansed of these impurities, it certainly will not be contended that they would be subject to an increased duty, by means of such cleansing, or that a bushel of 56 pounds of such seed would be anything more or less than a statutory bushel. So if, without such cleansing the amount of such impurities can be fixed at a certain percentage, as the findings in this case assume, we see no objection to the allowance being made, though the seed be not in fact cleansed" (157 U. S., p. 186).

So in the present case the sworn consular in-

voice, coupled with the United States weigher's return at the time of landing, shows that the 31 bales covered by the invoice acquired an accidental and temporary amount of moisture on the voyage of importation to the extent of 66 pounds.

The principle of the Seeberger case is much more clearly applicable to the present case for the reason that the importer proves by actual weight the amount of moisture which is absorbed and evaporates again before he gets his goods, whereas in the Seeberger case an average percentage only was shown, and the importer was delivered the gross weight of the flaxseed imported; but in the present case the added weight was only temporary, it was not present before the goods were shipped, nor was it present when they were withdrawn from bond. The water was an extraneous substance, which disappeared before the tobacco became incorporated with the general mass of property in the United States.

In other words, the water on which duty was here levied, did not constitute a part of the taxable subject or article of commerce, wrapper tobacco, originally, nor did it constitute a part of the wrapper tobacco, which went into consumption in the domestic markets.

The only paragraph under which duty can be imposed on this merchandise is Paragraph 213 of the Tariff Act of 1897, which, so far as pertinent reads:

> "Wrapper tobacco * * * if unstemmed,
> "One dollar and eighty-five cents per pound."

Clearly Congress did not intend to provide in Paragraph 213 for a duty of $1.85 per pound on "water" which did not go into consumption

when it provided for a duty of $1.85 per pound on "wrapper tobacco." We respectfully submit that even if it was within the constitutional power of Congress, it certainly was not the purpose of Congress to tax either air or water at any such exorbitant rate.

II.

The difference between the entered and withdrawal weights. of the bales in this case, did not represent a loss of the merchandise.

Section 2983 of the United States Revised Statutes reads as follows:

> "In no case shall there be any abatement of the duties or allowance made for any injury, damage, deterioration, loss or leakage sustained by any merchandise, while deposited in any public or private bonded warehouse."

It would seem to be a matter of common sense perception, rather than a matter of argument, that an accidental amount of moisture temporarily present in the bales at the end of a long sea voyage, does not, when it disappears again, constitute a "loss" of the merchandise.

The Circuit Court of Appeals found no difficulty in reaching a unanimous conclusion that such evaporation was not a loss of the tobacco. That is the real question in this case, and the numerous statutes, which the learned counsel for the petitioner seeks to construe, become immaterial, unless they show an intent on the part of the Congress to tax the moisture in question. No attempt is made, in the brief for the petitioner, to spell out

such an intent. On the contrary, an intent wholly irrelevant to this issue is sought to be shown, and the statutes therefore are not pertinent.

III.

The collector should have re-weighed the goods on withdrawal to correct his error in including a non-taxable subject in his weights at the time of entry.

The duty of $1.85 per pound on wrapper tobacco under the statute is only an unconditional and fixed duty as to tobacco entered for immediate consumption. That provision of the law is qualified by the provision which permits goods to be placed in bond.

When goods are placed in bond the time within which the duty becomes a fixed certainty does not expire until the date of that withdrawal, because if the duty increased for instance between its entry and its withdrawal from bond then $1.85 per pound does not apply as against the Goverment, and if the amount is not fixed against both the Government and the importer, then the amount is not finally fixed at $1.85 a pound for goods in bond until withdrawal.

Mosle vs. Bidwell (C C. A), 130 Fed. Rep., 334.

If the law were altered while goods are in bond, changing the manner of computation of duty, so that they would have to be re-weighed for the benefit of the Government, (for example, if the law were changed to make the weight of immediate coverings of tobacco dutiable, as is the

case of confectionery under Paragraph 212 of the Tariff Act,) then the weigher's return can only be final as to goods that are entered for consumption, and not placed in bond, and if the weigher's return is not final as against the Government, neither can it be said to be final as against the importer.

The facts in the present case show that it is not final, because at the time of withdrawal the collector did deduct from the weigher's return the actual and schedule tare. If he deducts the weight of the coverings from the weigher's return at the time of withdrawal, he should also deduct for the accidental moisture, which is no more dutiable than the coverings are. The collector having refused to re-weigh the goods to ascertain the amount of such moisture, and having insisted upon collecting duty on it at that time, the Circuit Court of Appeals held a cause of action arose against him, and protest was properly lodged at that time.

In *Lawder vs. Stone, 187 U. S., 281*, this Court held that a portion of a cargo of pineapples which had been reduced to slush, and which, therefore, ceased to be goods, wares and merchandise, was not dutiable, in spite of the provision of the law that no allowance should be made for "damage," unless it amounted to ten per cent. of the quantity imported. This Court further held that the provision with respect to damage had no application to the case inasmuch as the slush was not damaged goods, but not goods at all, and although the Government Examiner's return showed a certain number of pineapples imported, including an estimated number which he found by counting the tops in the slush, that the importer had a right to prove that

such return was incorrect in fact, and that a certain number of pineapples returned by the examiner had, in fact, been reduced to slush. In the present case the Government Weigher has returned a certain amount of accidental moisture for duty, and since such moisture is not goods, wares and merchandise, any more than the slush was in the pineapple case, the importer is entitled to show the amount of such accidental moisture returned by the Government Weigher for duty, although that fact cannot be ascertained until withdrawal.

IV.

Points in reply to the brief for the petitioner.

The United States Circuit Court of Appeals did not decide that the weight of imported tobacco at the time of its withdrawal in itself alone determined the amount of duties payable thereon, but that the cause of action does not arise until the withdrawal, for the reason that it is not known until then what is the actual amount of accidental moisture which is contained in the imported tobacco.

If the principles of law involved in the facts in this case are identical with the principles applied to the facts in the case of the dust in flaxseed, the numerous statutes which the counsel for the government sets forth in its petition would seem to be immaterial and irrelevant, for it might be granted that they all have the meaning for which he contends, and still this accidental moisture would not be dutiable any more than the acci-

dental dust in the flaxseed was. This Court said in that case that fifty pounds per bushel meant fifty pounds of clean seed. It may equally be said, in this case, that a pound of tobacco means the tobacco free from moisture acquired on the voyage of importation.

It is stated in the brief for the petitioner herein that "the amount of duty is one thing, the rate another, as if the same "rate" could be "collected" if the amount remained a constant, and the weight varied where the elements of rate are the unit of value and the unit of weight. Rate means ratio or proportion, so that $1.85 per pound means at the ratio of $1.85 to the pound. In the present case duties were collected on the tobacco contained in the three bales in question at the rate of $1.87, approximately, to the pound.

We admit the truth of the proposition of law stated in the heading to Point III of the brief for the petitioner, that the tobacco was dutiable upon its weight at "withdrawal" according to the facts of this case. No doubt the learned Solicitor General has had occasion to state the proposition so frequently in that form in the past that force of habit has rendered him blind to the fact that he is on the other side of the case for the moment.

It is further stated in the petition that:

> "In this case a certain amount of tobacco went into warehouse which weighed less when it came out. What became of the difference? It (the difference) was lost. * * * It certainly disappeared. And if it disappeared, no matter by what means, it must be lost."

The fallacy of the above argument lies in the promise that "a certain amount of *tobacco* went into wareh se." As a matter of fact a certain amount of tobacco, ***plus*** a certain amount of accidental moisture, went into warehouse; it is the moisture, constituting the difference, that has disappeared.

Reference is made to the loss of liquor by evaporation, but the distinction between such a loss, and that in the present case, is obvious, for in the case of the evaporation of liquor there is a loss of the thing in itself. In the present case there is not a loss of the tobacco.

It is stated no allowance was claimed at entry. The importers on this question have protested uniformly both at the time of entry and withdrawal. The opinion of the Circuit Court of Appeals shows that they regarded a protest at the time of entry premature, because no cause of action arose against the Collector until he refused to make allowance for the accidental moisture at the time of withdrawal. This is a matter of practice and does not affect the merits of the question.

The learned Solicitor-General cites Robertson vs. Bradbury, 132 U. S., 500, for the proposition that no allowance for ordinary moisture, nor for evaporation or shrinkage upon the voyage of importation should be made. In that case the goods were subject to an *ad valorem* duty. In the case at bar the duty is *specific*.

> "When the duty was specific on this article (sugar), being at a certain rate per pound, before the Act of 1846, it could, of course, ex-

tend to no larger number of pounds than was actually entered."

Marriott vs. Brune, et al., 9 How., 619, 631.
Lawder vs. Stone, 187 U. S., 281.

The learned Solicitor General cites the case of *Earnshaw vs. Cadwalader, 145 U. S., 247*, as controlling in this case. In that case the moisture found in the iron ore in question constituted an inherent part of it, and it was bought and sold in that condition to merchants. And this Court held, in effect, that in determining the dutiable weight of iron ore no deduction should be made on account of moisture and that it would be improper to ascertain the number of dutiable tons after first expelling the moisture by heating the ore to 212 degrees Fahrenheit, *because iron ore as known to the commerce of the United States was the ore in its natural state in respect to moisture.* The moisture in the ore case was an incident. The moisture in the present case is an accident. In the present case it was not the subject of a commercial transaction. It was neither bought, sold, nor delivered.

A different case and one governed by *Ernshaw vs. Cadwalader, supra*, would be made if after entry and before withdrawal the importer had, and took advantage of, the opportunity to drive off all moisture and create an abnormal dryness in the toba co. As a matter of fact, the sponge-like absorbent character of tobacco, and the fact that just before it is weighed at entry it has been through ocean transportation, gives to the Government an advantage quite as considerable and quite as inequitable as the importer sought to obtain in *Ernshaw's*

case; in the one case the importer sought to produce an abnormal and uncommercial dryness and minimum of weight to decrease duties, and in the other the Government seeks to take advantage of an accidental and unavoidable but abnormal and uncommercial amount of moisture and maximum of weight to increase duties.

The bonded warehouse in New York is not an unusually dry place, it has the temperature and other climatic conditions that obtain in the places where this tobacco is manufactured and where it is consumed. The decrease in weight that comes to the tobacco while in such warehouse is but the *normal elimination of a quantity of water that but for the ocean of transportation would not have been there at all*—that was not there when the exporter began the exportation and is not there when the importer receives and uses the importation.

If the flaxseed in the Seeberger case had been stored in bonded warehouse, and, in the process of handling, the dust had sifted out of the bags, which would have been a case precisely analogous to the present, we do not think this Court would have decided that case differently if the importer in that case had proved the actual amount of dust eliminated by weighing at the time of withdrawal, rather than claimed an average percentage at the time of entry. It would seem as if the Government counsel should have acquiesced in the claim of the importer in the present case, in view of its eminent fairness toward the Government, inasmuch as the importer only asked to be allowed for such moisture as he showed by actual weight at the time of withdrawal had disappeared, and which the Consular invoice showed he never bought.

V.

The unanimous decision of the Circuit Court of Appeals in the present case was right, and should receive the approbation of this Court by the denial of the present application.

Respectfully submitted,

EDWARD S. HATCH,
J. STUART TOMPKINS,
Counsel for the Respondents.

Dated New York, April 20th, 1906.

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